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No. 94-1614, 94-1631, 94-1985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WISCONSIN, Petitioner

v.

CITY OF NEW YORK, et al., Respondents

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United
States Court of Appeals for the Second Circuit

BRIEF OF COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATE OF OKLAHOMA, Petitioner

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UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners

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INTEREST OF THE AMICUS CURIAE

The respondents seek to compel an "adjustment" to the census results which, if translated into a mid-decade reapportionment of Congress, would cost Pennsylvania one seat in the House of Representatives and in the Electoral College, Pet. App. 87. Pennsylvania would, in that case, have to re-draw its congressional districts. In addition, because Pennsylvania bases its own state legislative districts upon the "official reporting of the Federal decennial census," Pa. Const., Art. 2, §17, an adjustment to the census results might also require a mid-decade redistricting of the Pennsylvania General Assembly. Finally, Pennsylvania believes that the decision of the Court of Appeals, if allowed to stand, will turn every census into an occasion for endless litigation, prolonged political turmoil, and ultimately, loss of public confidence in the representative branches of government--results which Pennsylvania, along with the rest of the States, has an interest in avoiding.

SUMMARY OF ARGUMENT

The Court of Appeals erred by importing into this case the standard of heightened scrutiny adopted in cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), involving state redistricting. Instead, the Court should continue the course set in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992) and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), in which the Court deferred to the decisions of the responsible federal officials unless those decisions were inconsistent with the language of the Constitution. Under this standard, the Secretary's decision not to "adjust" the census count should not be disturbed.

1. It is extremely doubtful that the type of "adjustment" contemplated in this case is even permitted by the Constitution. The Constitution requires that the census be an "actual Enumeration" of the persons "in each State," but the adjustment contemplated here is neither. It is a statistical manipulation of the actual census count, in which some people who were actually counted are dropped while other people are counted twice; and in which the totals for each State are based on people who live in other States.

2. In any event, the Constitution does not require this adjustment, which would be a fundamental change from the practice of the last 200 years. There is no clear evidence that this adjustment would improve the accuracy of the census in the only constitutionally relevant sense: improving the fairness of the apportionment of the House of Representatives among the States. On the other hand, this adjustment would expose the census to the perception--and the reality--of partisan manipulation to achieve a preferred result, and might well undermine support for the census itself.

3. The standard used by the Court of Appeals, which is derived from this Court's redistricting cases, is not well-suited to the very different problem presented by this case.

It will involve the courts in areas well beyond their institutional competence; it rests on factual assumptions which have not been demonstrated; and it invites endless litigation over the census itself and consequent redistricting. This will undermine the legitimacy not just of the census itself, but of the representative branches of government whose composition depends upon the census.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE THE SECRETARY OF COMMERCE TO "ADJUST" THE CENSUS COUNT.

The Secretary of Commerce decided, after extensive deliberation, Pet. App. 135-416, not to "adjust" the census count. Pennsylvania submits that the proper standard for reviewing that decision should be derived from *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), and not from state redistricting cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), and its progeny. In *Franklin* and *Montana*, the Court held that constitutional claims involving the census and the reapportionment of Congress are justiciable. *Franklin*, 112 S.Ct. at 2776 (census); *Montana*, 503 U.S. at 459 (reapportionment). In both cases, however, the Court recognized that the Constitution entrusts these tasks, in the first instance, to other branches of government, whose decisions are entitled to considerable deference from the courts.

In *Franklin*, the Court began by recognizing that the decennial census is to be conducted "in such Manner as [Congress] shall by Law direct," *id.*, 112 S.Ct. at 2771, *quoting* U.S. Const., Art. I, §2, cl. 3 (bracketed matter the Court's), and that Congress in turn has authorized the Secretary of Commerce to take the census "in such form and manner as [s]he may determine." *Franklin*, 112 S.Ct. at 2771, *quoting* 13 U.S.C. § 141(a)(bracketed matter the Court's). The Court ended by asking simply whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

In *Montana*, the Court recognized Congress' broad authority to reapportion itself among the States, and

recognized as well that the *Wesberry* standard of "complete equality for each voter," *Montana*, 503 U.S. at 463, has little usefulness outside of the context in which it arose--drawing district lines *within* a State. "Neither mathematical analysis nor constitutional interpretation provides a conclusive answer....The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Ibid.* Congress' choice among courses is thus entitled to "far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.*, at 464.

Pennsylvania submits that the Court should decide this case in the same way that it decided *Franklin* and *Montana*: by asking whether the Secretary's decision is "consistent with the constitutional language and the constitutional goal of equal representation," while recognizing that the Constitution and Congress have entrusted the Secretary with broad discretion in conducting the census, and that there may well be more than one constitutionally permissible course for the Secretary to choose. Viewing the Secretary's decision against this standard, Pennsylvania has no doubt that the District Court was correct in refusing to disturb it.

1. Turning first to the constitutional language, Pennsylvania has considerable doubt that the "adjustment" contemplated by the respondents is even permitted, let alone required, by the Constitution. As the Court observed in *Franklin*,

> Article I, §2, cl. 3 of the Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers," which requires, by virtue of §2 of the Fourteenth Amendment, "counting the whole number of persons in each State."

> The number of persons in each State is to be calculated by "actual Enumeration," conducted every 10 years, "in such manner as [Congress] shall by Law direct." U.S. Const., Art. I, §2, cl. 3.

112 S.Ct. at 2770-71. The adjustment contemplated, however, would not be an "actual Enumeration," nor would it count the number of persons "in each State."

On the first point--that the adjustment would not be an "actual Enumeration"--the Secretary pointed out that the adjustment is *not* a process of finding actual persons who were missed by the census and adding them into the count.

> [M]any civic leaders are under the impression that an adjustment will fix a particular problem they have identified--for example, specific housing units or group quarters that they believe we missed. It does not do so.

Pet. App. 144. Rather, the adjustment is a statistical manipulation of data to generate a new population estimate; it does this, essentially, by dropping from the total some people who were actually counted, and by counting other people twice.

> [A]n adjustment ... would add over 6 million unidentified people to the census by duplicating the records of people already counted ..., while subtracting over 900,000 people who were actually identified and counted.

Ibid. This is not what most people would describe as an "actual Enumeration."

Moreover, the adjustment is reached by extrapolating to communities, States, and the Nation the results of a relatively small sample of 5,000 blocks. Pet. App. 56-57. Thus, as the Secretary said, by definition the adjustments for any particular community "are often based largely on data gathered from communities in other states." Pet. App. 144. The result would be that,

> for the first time, the apportionment [of the House of Representatives] would not be determined solely on the basis of the number of persons within each State's borders....For example,...the certified population count for Delaware would depend on the results of the [sample] in Maryland, the District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida.

Pet. App. 251-52. This, Pennsylvania submits, would contravene the Fourteenth Amendment's command that the apportionment of the House be based on the number of persons "in each State."

2. Even if the Constitution does not positively forbid this kind of adjustment in the census count, it surely does not require it. Subjecting the results of the census' "actual Enumeration" to this kind of statistical manipulation would depart dramatically from the established practice of the past 200 years; as the Secretary observed, it would be "a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 248. *See Franklin v. Massachusetts*, 112 S.Ct. at 2785-86 (Stevens, J., concurring in part and concurring in the judgment)(in reviewing Secretary's decisions, courts may look to "long-held administrative tradition"). Such a "fundamental change"

should be forced upon the country only on a clear showing of its constitutional necessity, but it is precisely here that the Court of Appeals' analysis breaks down.

There is no clear evidence that the adjustment contemplated would improve the accuracy of the census for the only purpose which is constitutionally relevant: ascertaining the *relative* populations of the States so as to reapportion the Congress among them. The constitutional focus, in other words, must be on what the Secretary called "distributive accuracy--that is, getting most nearly correct the proportions of people in different areas," Pet. App. 146-47, rather than "numeric accuracy," or "getting absolute numbers right." Pet. App. 184.[1] That was the Secretary's conclusion, Pet. App. 146-47, 184, and he was certainly correct.

Even at the level of technical statistical analysis, it was far from clear that an adjustment would improve the distributive accuracy of the census. The technical issues involved are, according to the Secretary, "at the forefront of statistical methodology." Pet. App. 144. Expert opinion was divided, Pet. App. 139-40, and the Secretary ultimately concluded that the case for an adjustment had not been made:

> [T]he evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration....Simply correcting for the estimated net undercount can improve numeric accuracy but significantly worsen distributive

[1]Perhaps counter-intuitively, the two do not go hand in hand. The Secretary's decision includes an illustration of how an adjustment could improve the numeric accuracy of the total population count for the Nation, and for each State within the Nation, while simultaneously *decreasing* its distributive accuracy, thus depriving some States of the representation to which their share of the population would entitle them. Pet. App. 183.

> accuracy. We can see that we missed people in most areas, but we lack a tool which can improve the distribution of population for the purposes of political representation and funding.

Pet. App. 185.

Beyond the technical statistical issues, however, the Secretary was troubled by the implications of an adjustment for future censuses. First, and most troubling, the adjustment process exposes the census to the possibility of political or other manipulation to achieve a preferred result. According to the Secretary, it was impossible to prespecify the adjustment procedure in all respects. Pet. App. 228. As a result,

> in the adjustment procedure an individual or responsible group must make choices which have politically significant effects ... that can be transparent to those making the choices....[S]mall changes in methodology can move seats in the House. It is also true that small changes in the census enumeration can move seats in the House as well, but no individual involved in the enumeration process can predict how.

Ibid; Pet. App. 236-37 ("Decisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions.") This fact alone should make anyone think hard, and hesitate long, before imposing such an adjustment on the country. The perception, if not indeed the reality, of such partisan manipulation of the census can only increase popular cynicism toward the representative branches of government, and undermine their legitimacy.

Second, the possibility of post-census adjustments may well undermine the efforts of the Census Bureau to obtain the best possible count during the actual enumeration. *See* Pet. App. 233-35. The Secretary feared that "an adjustment will remove the incentive that [local] officials and groups currently have to provide active support in achieving a complete count," Pet. App. 234, by providing a false sense of security that any shortcomings in the actual enumeration would be made good in the adjustment. An adjustment could thus well set in motion a downward spiral in which deteriorating census counts become the justification for greater and greater "adjustments," which in turn undermine the census still more.

3. The Court of Appeals, however, took quite a different approach to this case. Far from deferring to the Secretary's decision, the Court of Appeals held instead that that decision should be subjected to a form of "*heightened* scrutiny," Pet. App. 34 (emphasis added), which the Court of Appeals derived from this Court's decisions involving state redistricting. The Court of Appeals, looking to such cases as *Wesberry v. Sanders*, *supra*, and *Karcher v. Daggett*, 462 U.S. 725 (1983), Pet. App. 37, said that the Secretary's decision not to adjust the census count was similar to a State's failure to equalize the populations among its legislative districts, and would have to be similarly justified. The Court of Appeals thus held that on remand to the District Court, the Secretary would have to prove that his decision "(a) furthers a governmental objective that is legitimate, and (b) is *essential* for the achievement of that objective." Pet. App. 40 (emphasis added). Pennsylvania submits, however, that this approach is deeply flawed.

In the first place, the underlying standard of the *Wesberry* line of cases--precise mathematical equality among districts--is ill-suited to the problem at hand. Dividing a known population equally among a finite number of districts

is not the same sort of problem as getting the best possible count of that population in the first place. Redistricting decisions are "capable of being reviewed under a relatively rigid mathematical standard," *Department of Commerce v. Montana*, 503 U.S. at 464; but the issue of how best to conduct the census has required the courts to referee arcane disputes among "statisticians, demographers and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Tucker v. Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992). So foreign is this area to the courts' institutional competence that one court has remarked that "you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Ibid.*

Second, the Court of Appeals' application of *Wesberry* and its progeny to this case rests on that court's assumption that the adjustment contemplated would in fact bring the census closer to the goal of mathematical perfection. *See* Pet. App. 38-39. But this, as we have already demonstrated, is an extremely dubious proposition to which the Secretary does not subscribe, and it is not clear why the Court of Appeals was in a better position than the Secretary to make that judgment.

Third, the logic of the Court of Appeals' decision implies that in the future, the Secretary will be obliged similarly to justify--as *essential* to a legitimate government objective--the failure to take *any* step which, in a reviewing court's opinion, would improve the accuracy of the census. The Secretary's open-ended obligation would be limited only by the ingenuity of special-interest advocates and their experts in devising new ways to gather or manipulate the census data. In the future, then, the States can look forward to at least two, and maybe three, rounds of litigation in each redistricting cycle: first over the districts drawn on the basis of the census numbers as originally reported, then over the legality of the

census itself, and finally over any re-redistricting required by court-ordered revisions in the census results. Litigation of this kind could leave the composition of the Congress and the Electoral College, and redistricting within each State, unsettled well into each decade, with results that can only be called destructive.

CONCLUSION

For these reasons, Pennsylvania asks the Court to reverse the judgment of the Court of Appeals, and to remand the case to that Court with directions to affirm the judgment of the District Court.

Respectfully submitted,

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